FORT BELKNAP COMMUNITY COUNCIL

IBLA 93-354 Decided May 21, 1998

Appeal from a decision of the Area Manager, Phillips Resource Area, Montana, Bureau of Land Management, finding no significant environmental impact and approving a removal/reclamation plan for the King Creek Tailings Deposit. MTM-80992.

Affirmed.

1. Environmental Quality: Environmental Statements--Mining Claims: Environment--National Environmental Policy Act of 1969: Environmental Statements--National Environmental Policy Act of 1969: Finding of No Significant Impact

   BLM properly decides to approve a proposed plan for removing and reclaiming a mill tailings deposit absent preparation of an EIS where, in accordance with section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1994), it has taken a hard look at the environmental consequences of such activity, taking into account all relevant matters of environmental concern, and made a convincing case that, given appropriate mitigation measures, no significant impact will result therefrom. Its decision not to prepare an EIS will be affirmed where the appellant did not demonstrate, with objective proof, that BLM failed to consider a substantial environmental problem of material significance to the proposed action, or otherwise failed to abide by the statute.

APPEARANCES: James L. Vogel, Esq., Hardin, Montana, for the Fort Belknap Community Council; Paul Zogg, Esq., Boulder, Colorado, and Robert Golten, Esq., Indian Law Clinic of the University of Colorado, Boulder, Colorado, for Island Mountain Protectors; Jim Butler, Esq., Patrick J. Garver, Esq., and Lisa A. Kirschner, Esq., Salt Lake City, Utah, and Alan L. Joscelyn, Esq., Helena, Montana, for Zortman Mining, Inc.; Karan L. Dunnigan, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Fort Belknap Community Council (FBCC) has appealed from a March 23, 1993, Record of Decision (ROD) of the Area Manager, Phillips Resource Area, Montana, Bureau of Land Management (BLM), approving a removal/reclamation plan for the "King Creek Tailings Deposit" proposed by Zortman Mining, Inc. (ZMI). 1/ Included in the ROD was a finding of no significant impact (FONSI). The ROD/FONSI was based on a March 23, 1993, environmental assessment (EA) (MT-065-92-043), which was prepared by BLM, in cooperation with the Montana Department of State Lands (DSL).

The "King Creek Tailings Deposit" is a 13-acre area containing tailings, generated by milling operations during the 48-year period from 1894 through 1942, which is located within the 202-acre headwaters of King Creek, an ephemeral stream, in the Little Rocky Mountains of north-central Montana. Such operations involved the crushing of gold-bearing ore and further processing, using cyanide leaching, to extract gold and other precious metals. ZMI determined, based on test diggings made to either bedrock or underlying soil horizons in July 1990, that the deposit contains tailings material which ranges in size from fine sand to coarse gravel and ranges in depth from 2 to 7 feet. ZMI estimated the total amount of the deposit to be 63,000 cubic yards.

The deposit is located immediately north and downstream of ZMI's Landusky (formerly August) Mine and less than 1/2 mile east of the Fort Belknap Indian Reservation. 2/ It encompasses both private lands (patented under the general mining laws) and public lands, subject and not subject to unpatented claims under those laws. The deposit covers land in an elongated strip along the streambed and banks of King Creek. It is broken into two parts, the larger "Upper Original Tailings Deposit," about 1,200 feet long and 300 feet wide, at the upstream end, and the much smaller "Lower Redeposited Tailings," about 675 feet long and 75 feet wide, at the downstream end of the overall deposit. (ZMI's "Proposed Removal and Reclamation of the King Creek Tailings Deposit, Phillips County, Montana"

1/ FBCC is the governing body of the Gros Ventre and Assiniboine tribes, whose members reside on the Fort Belknap Indian Reservation. By Orders dated Aug. 18 and Oct. 13, 1993, the Board granted requests by ZMI and Island Mountain Protectors (Island Mountain), an association of Fort Belknap tribal members dedicated to environmental preservation within the Reservation and in the nearby Little Rocky Mountains, to intervene in the instant proceeding. Island Mountain appears in support of FBCC.

2/ Open pit mining by ZMI, a subsidiary of the Pegasus Gold Corporation (Pegasus), at the Landusky Mine has been the subject of prior adjudication by the Board. See Red Thunder, Inc., 124 IBLA 267 (1992); Red Thunder, Inc., 117 IBLA 167, 97 I.D. 263 (1990). None of the tailings at issue here was created by these mining operations. Rather, there is evidence that, in conjunction with mining during the early 1980's, Landusky Mining, Inc., another subsidiary of Pegasus, removed about 187,000 cubic yards of tailings from the tailings deposit, or about 75 percent of the original amount.

(Draft Plan), dated June 1992, at 13.) There is a small sediment-control dam, about 160 feet long, 9 feet wide, and 19 feet high (on the downstream side), across the drainage at the point where King Creek leaves the tailings deposit. 3/ From that point, the creek continues northwest less than 1/2 mile to a point where it enters the Indian Reservation. Within about 2 miles, it joins the South Big Horn Creek and then the South Fork of Little Peoples Creek, and eventually the North Fork of Little Peoples Creek and Peoples Creek, before exiting the Reservation.

It is undisputed that the tailings deposit is "easily eroded," especially since it is not amenable to revegetation and stabilization. (Draft Plan at 1; see EA at 1.) Consequently, over the many years since the tailings were deposited, a considerable amount of material has been carried by King Creek further downstream to Little Peoples Creek and its tributaries, particularly during major storm events and periods of high spring runoff which punctuate the climate in this semi-arid region. See EA at 12.

In a September 1979 report entitled "Mine Tailings Investigations, Little Peoples Creek Drainage, Fort Belknap Indian Reservation, Montana," prepared for the Bureau of Indian Affairs (BIA), the engineering firm of Morrison-Maierle, Inc. (Morrison-Maierle), determined the amount and location of tailings that had been carried downstream from the main deposit, and assessed the resulting environmental impacts. It estimated that a total of between 2.9 and 3.3 million cubic feet of eroded tailings had been deposited in a multitude of locations in streambeds and banks along about 13.6 miles of Little Peoples Creek and its tributaries, King Creek and South Big Horn Creek. (Morrison-Maierle Report at 34, 53.) Of that amount, 1.57 million cubic feet of these tailings were to be found on Reservation lands. 4/ Id. at 53. Morrison-Maierle further concluded, after chemical analyses of the tailings and surface water, and an overall assessment of the environment:

> Although the monetary value of damages caused on the Fort Belknap Indian Reservation due to degradation of water quality in Little Peoples Creek and its tributaries by high suspended sediment loads cannot be accurately assessed, the need to implement a solution to the continued degradation of the surface waters is highly evident. The fact is clear that degradation of surface water quality is resulting in continued loss of fish and wildlife habitat on the reservation lands to the irreparable damage of the reservation inhabitants.

3/ The current dam was constructed in 1975, and is the last of a series of three dams built, starting in 1951, to control sediment releases into King Creek from the main tailings deposit. The two prior dams failed, releasing large quantities of sediment, and were replaced.

4/ The record elsewhere states that the total amount of tailings deposited downstream of the headwaters deposit is between 1.3 and 1.75 million cubic feet. (EPA's "Preliminary Assessment, King Creek" (Preliminary Assessment), dated Jan. 26, 1993, at 8.) If true, this would likely mean that a smaller quantity is also found on Reservation lands.

Id. at 152. Morrison-Maierle, thus, attributed adverse environmental impacts, especially to fish and wildlife habitat, to increased turbidity and sediment loads in downstream waters, rather than to the presence of heavy metals leaching from the tailings deposit. Id. at 36-37, 105-06, 131, 134-35, 140.

Under its plan, ZMI basically proposed to excavate and remove all of the tailings material from the basin slopes and creek bottom so as to "expose the natural topography and soils of the area," and then to reclaim all of the land affected by the original tailings deposit "by providing soil stability, vegetation diversity, and additional water quality protection." (Draft Plan at 2-3, 17.) The material would, over a 2-month period, be excavated and trucked about 1/2 mile to the Landusky Mine, for stockpiling and use on mine roadways and for other purposes. Any excess tailings would be placed on approved waste dumps. Excavation would start at the dam site, and continue upstream. Following removal, the exposed topsoil would be graded to "blend with the adjacent topography," and then ripped or harrowed, seeded or planted with native grass, shrub, and tree species, mulched, and fertilized. Id. at 18. Absent suitable rock material in the original creek bottom, the channel would be stabilized with rip-rap. Rip-rap would also be placed in small dams in steep gradient sections of the creek, to dissipate stream energy, and along stream banks subject to erosion. Revegetation would be monitored during the first season after seeding/planting, and a second attempt made to revegetate any "problem areas." Id. at 24. Finally, all water control structures would be "periodically inspected and maintained to ensure they are functioning properly." Id. The dam would initially be left in place for several years following reclamation and monitored to ensure that it continues to control any sediment migration, and eventually replaced with a rock erosion control structure.

In its EA, BLM, together with the Montana DSL, considered the environmental consequences of either adopting ZMI's proposed plan for removing and reclaiming the tailings deposit, the preferred alternative, or a "no action" alternative, focusing on the potential impacts to hydrology, soils, vegetation, fish and wildlife, aesthetics, land use, and cultural resources. 5/ The overall conclusion of the EA was that the preferred alternative would improve drainage stability in the headwaters area of King Creek and decrease sediment loads in the creek, thus improving downstream water quality and wildlife habitat. (EA at 14, 16.) The EA was not initially drafted and offered for public comment, but rather was prepared in final form on March 23, 1993.

Also on March 23, 1993, the Area Manager issued her ROD/FONSI. Therein, she concluded, based on the EA, that adoption of the proposed

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5/ Montana DSL has jurisdiction over the private lands encompassed by ZMI's proposed plan.

plan would have no significant impact on the quality of the human environment, and thus BLM was not required by section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (1994), to prepare an environmental impact statement (EIS). Most importantly, she decided to approve the plan because it had the "potential * * * to improve the water, soil, vegetation, and aesthetic condition in the [King Creek] drainage basin," but provided that implementation of the plan would be monitored:

> The action will be monitored by BLM for any unanticipated impacts at least weekly during project implementation. Until the area stabilizes, BLM will examine the reclamation progress on a yearly basis to determine the need for any corrective actions.
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> If any changes in removal procedures or corrective actions are identified, the BLM will notify ZMI and consult regarding implementation.

FBCC appealed the Area Manager's ROD/FONSI.

In its statement of reasons for appeal (SOR), FBCC, while supporting BLM's overall aim of "cleaning up" the King Creek Tailings Deposit, contends that the Area Manager, in her ROD/FONSI, improperly approved adoption of ZMI's removal/reclamation plan and found that no significant impact would result therefrom where BLM had not adequately considered the environmental impacts of that course of action. 6/ FBCC also asserts that BLM must prepare an EIS.

At the outset, we note that FBCC, together with Island Mountain, contends that the scope of the EA was fatally flawed where it addressed only ZMI's immediate proposal to remove and reclaim the tailings deposit, and thus failed to address a comprehensive scheme for cleaning up the entire King Creek drainage sullied by mill tailings. 7/ This is quite evident in FBCC's fear that, by focusing on the threat posed by the tailings deposit at the headwaters of King Creek, BLM will somehow be dissuaded

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6/ Island Mountain agrees with much of FBCC's basic arguments for reversing the Area Manager's ROD/FONSI. Where it agrees, we make no particular reference; however, we will address the arguments made by Island Mountain that, while supportive of FBCC's position, differ in some manner from those offered by the appellant.

7/ Island Mountain couches its argument that BLM failed to properly address the overall problem posed by historic tailings in terms of BLM's failure to properly address all reasonable alternatives. See SOR at 6-7. However, a proposal to deal with tailings in the original deposit and downstream is not an alternative to the proposal. Rather, Island Mountain has raised the question as to whether BLM properly defined the scope of its NEPA review. See 40 C.F.R. § 1508.25; Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985).

from addressing the more general problem of the drainage: "[T]he cleanup effort * * * could be looked at as a sufficient effort to at least temporarily `mitigate' the problem, and actually be a roadblock to more complete efforts to address the drainage-long problem." (SOR at 1.) FBCC does not identify the "drainage-long problem." Instead, this is spelled out by Island Mountain, which argues that BLM improperly failed to address the threat posed by the 1.5 million cubic feet of tailings no longer found in the headwaters deposit, but rather scattered along Little Peoples Creek and its tributaries: "Common sense, if not scientific analysis, would point to the unreasonableness of BLM cleaning up tailings on [F]ederal land and private land, then allowing the more than 1.5 million cubic feet of tailings that have already eroded downstream, and continue to erode downstream, to go untouched." (SOR at 7.) FBCC and Island Mountain thus contend that BLM has improperly narrowed the "scope of the problem." (FBCC SOR at 1.)

[1] Notwithstanding the desirability of cleaning up all mill tailings along the entire King Creek drainage, ZMI's submission of the plan at issue allowed BLM to facilitate cleaning up the headwaters deposit. We are not persuaded that BLM violated NEPA by doing so. FBCC and Island Mountain have made no effort to demonstrate that cleaning up the headwaters deposit and cleaning up the multitude of scattered downstream deposits are "[c]onnected" or "[s]imilar" actions, within the meaning of 40 C.F.R. § 1508.25(a), and that BLM was thus required to address their various environmental impacts in a single environmental review document (whether an EA or EIS). See, e.g., Southern Utah Wilderness Alliance (SUWA), 122 IBLA 165, 168, 170 (1992).

In no sense can one action be said to trigger or be dependent on the other. Both are independent actions that may be undertaken separately. Indeed, it cannot be said that cleaning up the headwaters deposit will impair or impede, in any way, additional efforts to deal with downstream deposits, and vice versa. The evidence shows that these two actions are dissimilar in nature and environmental effect. Scott Haight, a BLM Geologist, reports on an early scoping meeting attended by representatives of BLM, Montana DSL, U.S. Environmental Protection Agency (EPA), and others, noting as follows: "There was also discussion on the need for tailings removal further down drainage on the Fort Belknap [Indian] Reservation. Most of these tails are in small pockets located well within the dense riparian vegetation zones; and may require more environmental disturbance to remove than the environmental benefits gained." (Notes to the File Re: Nov. 13, 1991, Meeting (Haight Notes).) Further, Morrison-Maierle, in recommending measures to remedy the adverse impacts from tailings deposits, recognized that the deposits at the headwaters of King Creek and those further downstream may have to be dealt with separately: "Any scheme of tailings retention or stabilization must consider the fact that two separate and distinct tailings source areas exist that may require independent and dissimilar treatments." (Morrison-Maierle Report at 143.)

We, thus, conclude that BLM properly limited the scope of its environmental review, and subsequent decisionmaking, to removal and reclamation of the original tailings deposit. SUWA, 122 IBLA at 168-69, 170.

FBCC is particularly concerned that the efforts made by ZMI to remove and reclaim the tailings deposit will have adverse consequences for residents and property within the Reservation. This concern is based on the fact that "King Creek water runs directly onto the Fort Belknap Indian Reservation." (SOR at 1.) However, FBCC presents no evidence that any of the activities undertaken by ZMI to remove and reclaim the deposit will have any adverse impact on residents or property within the Reservation, either by virtue of the fact that the Reservation is downstream from the deposit or on any other basis. Furthermore, it is evident from the EA and elsewhere in the record that BLM fully considered the impact of cleanup work on downstream residents and property, in terms of potential impacts to water quality in King Creek and other streams. 8/ See EA at 11-12, 14-15, 17; Letter to Dr. William Li Pera from Susan L. Muza, Regional Representative, Agency for Toxic Substances and Disease Registry (ATSDR), U.S. Department of Health and Human Services, dated Nov. 4, 1992 ("After reviewing the available data, ATSDR has determined that there is no evidence that the health of residents of the Fort Belknap Indian Reservation is being adversely impacted by contaminants in water or sediment in Kings Creek or other creeks in the area"); Letter to Dr. Pera from Muza, ATSDR, dated Jan. 19, 1993.

8/ Island Mountain takes particular exception to BLM's determination, in the EA on page 11, that the water quality in King Creek is generally good, with "low concentrations of * * * metals," contrasting this finding with that by EPA, in its Preliminary Assessment on page 9:

"Elevated levels of total recoverable metal concentrations in surface water have been recorded by several sources in the vicinity of the historic mine tailings located at the King Creek headwater area * * *. Specifically, selenium, lead, arsenic and cadmium levels exceed drinking water standards (MCLs [Maximum Contaminant Level]) * * *. Lead, silver and selenium levels in the King Creek headwaters exceed chronic freshwater aquatic standards[.]"

See SOR at 4-5. We find no contradiction. BLM referred to King Creek specifically, while EPA referred to "surface water" in the area of the creek's headwaters generally. EPA attributed the higher concentrations in the headwaters area to the fact that "[s]urface water in the King Creek headwater area is in direct contact with historical mine tailings." (Preliminary Assessment at 9.) This was contrasted with the quality of water downstream: "Samples taken downstream of the headwaters area indicate a dilution or general decrease in the metals concentrations in the surface water * * *. Approximately 3.5 miles downstream of the site area, the metal concentrations in the surface water drop below the MCLs and the aquatic standards * * *." Id. In any case, EPA's report only serves to justify immediate action to eliminate the main tailings deposit, since it is contributing to elevated metal levels and absent evidence that removal will itself contribute to any elevation.

While FBCC argues that BLM is required to prepare an EIS, it neither identifies a significant environmental impact likely to result from implementation of ZMI's removal/reclamation plan, nor even asserts that there is likely to be such an impact. At best, it states: "This `cleanup' appears to be * * * [connected] to a far larger antic[i]pated problem and deserves a full EIS analysis." (SOR at 2-3.) The larger "problem" consists of the residual impacts of ZMI's mining activity in the area of the tailings deposit. FBCC presents no evidence regarding the actual nature or scope of this problem. 9/ Even assuming one exists, we are not persuaded that any continuing effects of mining will, together with the effects of the proposed removal/reclamation activities, have any significant cumulative impact on the quality of the human environment. See EA at 17. Nor is there evidence that removal and reclamation of the tailings deposit itself will have any significant impact on that quality. Thus, we hold that BLM did not violate section 102(2)(C) of NEPA by deciding not to prepare an EIS. Concerned Citizens for Responsible Mining (On Reconsideration), 131 IBLA 257, 265, 268, 269 (1994).

Next, FBCC notes that the only testing done to determine the content of the tailings was performed by Pegasus, ZMI's parent company. It contends that such "self-monitoring" is "of great concern, especially in light of recent revelations that previous assurances by Pegasus about its activities have proven `incomplete,' at best." (SOR at 2.) Island

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9/ Noting that it "has been informed that sul[f]ate levels in King Creek have been increasing," FBCC argues: "The source of such increases needs to be investigated, as open pits in the area[], if responsible for such higher levels, must be considered for the `cleanup' to be effective." (SOR at 2.) There is no question that the source of the increases should be determined, and efforts taken to correct the situation. However, there is no evidence the increased levels are due to the tailings deposit, or would be exacerbated by removal of that deposit. The only evidence of increases in sulfate levels is that reported by Wayne E. Jepson, an hydrologist with the Hard Rock Bureau, Montana DSL, and cited by Island Mountain. See SOR at 5 (citing Ex. C attached thereto). However, such an increase, based on comparing 1978 and 1991 data, was not detected "in King Creek" (SOR at 5), as stated by Island Mountain, but rather in surface water "at the head of King Creek," as reported by Jepson. (Ex. C attached to Island Mountain's SOR at 5.) He also noted that, "further downstream," the sulfate level was only "slightly elevated." Id. Most importantly, he attributed the increase to "waste rock used in road building, or * * * seepage through mine pit floors." Id.; see also Morrison-Maierle Report at 131 ("Sulfide minerals are reported as a minor accessory mineral in the area around the August Mine ore body * * *, but are not a major mineral in the ore"). What is at issue here is whether BLM can properly go forward with the cleanup of the tailings deposit, not whether further action should be taken to remedy additional environmental threats from mining or related activity, which is properly the subject of further review and decisionmaking.

Mountain also objects to the fact that the testing was performed on only one sample, and the results extrapolated to the entire tailings deposit, even though it consists of two different types of material deposited at different times, i.e., coarse material deposited prior to 1930 and fine material deposited thereafter. See SOR at 5.

The testing to which FBCC and Island Mountain refer was performed by Energy Laboratories, Inc., on a tailings sample submitted by ZMI on November 7, 1991. (Draft Plan at 5 ("Exhibit 2").) The sample revealed "low * * * concentrations" of various extractable metals, including arsenic, cadmium, lead, mercury, and selenium. (EA at 11.) Thus, the tailings were generally regarded as "not a hazardous material * * *, or even hav[ing] potential to generate leachate of great environmental concern." Id. at 10. FBCC and Island Mountain have presented no evidence that the testing methodology was inappropriate, or that the testing itself was inadequately performed. Nor have they offered any evidence that the results of the testing do not accurately reflect the content of the tailings. We are thus not persuaded that there was any error in the testing procedure or results. FBCC has also not enunciated what the "revelations" have disclosed, or demonstrated, with any particularity, how Pegasus' assurances have been proven to be "incomplete," or even wrong. The headwaters and downstream tailings deposits and the quality of surface water at the headwaters of King Creek and at downstream locations have been extensively surveyed by various parties, and this information was before BLM prior to its ROD/FONSI. See EA at 11-12; Memorandum from Toxicologist, ATSDR, dated Oct. 21, 1992, at 2; Memorandum from Toxicologist, ATSDR, dated Nov. 20, 1992, at 1-2; Preliminary Assessment at 5-6, 8-9; see also Morrison-Maierle Report at 121-23, 130-31, 131, 132-33. All of this confirms that the water quality is, for the most part, not adversely affected by any of the tailings deposits. Indeed, Morrison-Maierle, which collected samples at various sites on Little Peoples Creek and its tributaries, reported in September 1979 that the "water is chemically suitable for all uses including drinking water supplies and does not contain harmful levels of any inorganic contaminant that might be derived from the mine tailings sediments." (Morrison-Maierle Report at 131.)

We recognize that BLM is required by NEPA to consider all reasonable alternatives to a proposed course of action, whether in an EA or an EIS. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Howard B. Keck, Jr., 124 IBLA 44, 53 (1992). FBCC, however, does not identify any other alternative that BLM should have considered, except to state: "The E.P.A. is considering one alternative right now. It is simply improper for this and other alternatives to be overlooked by the B.L.M." (SOR at 2.) There is no evidence that EPA is considering any alternative plan of action for cleaning up the original tailings deposit. Rather, FBCC elsewhere states that EPA is only assessing whether to designate that deposit, and the other deposits along the King Creek drainage, as a "[S]uperfund" site. Id. Presumably, should that occur, EPA will then consider how to clean-up the deposits. However, until that occurs, EPA is plainly not considering any alternative that

should also be addressed by BLM. Thus, we are not persuaded that BLM failed to consider any reasonable alternative to ZMI's proposed removal/ reclamation plan. Headwaters, Inc., 116 IBLA 129, 135 (1990).

FBCC, along with Island Mountain, contends that BLM failed to abide by the public comment requirements of NEPA. 10/ FBCC particularly asserts that BLM should have solicited comments from interested parties, such as Red Thunder, Mineral Policy Center, Montana Environmental Information Center, and Island Mountain, since they had previously provided input regarding the environmental impact of mining activity in the vicinity of the tailings deposit.

NEPA and its implementing regulations do not explicitly require prior notice followed by a specific opportunity for public comment in connection with promulgation of any EA. 11/ SUWA, 122 IBLA 334, 341 (1992). However, we have recognized that the "statutory scheme * * * clearly envisions active public involvement in the NEPA process." Id.; see also Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972), cert. denied, 412 U.S. 908 (1973). BLM's failure to provide notice of the availability of the EA to the public generally, or even to interested or affected members of the public, and to solicit any information from the public generally before taking action was in technical violation of 40 C.F.R. §§ 1506.6(b) and (d); however, we conclude that the violation of NEPA was de minimis. See 40 C.F.R. § 1500.3.

BLM did involve interested and affected members of the public, or their representatives, in its evaluation of ZMI's plan. The record reflects that a November 13, 1991, meeting, which was attended by representatives of EPA, Montana DSL, Montana Water Quality Bureau, and BIA

10/ Island Mountain argues that BLM was also required, by certain provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1701-1784 (1994), to provide prior notice and an opportunity for public comment before taking action. However, the provisions to which it refers concern public participation in the Secretary of the Interior's promulgation of regulations regarding the management of the public lands or require him to promulgate regulations that themselves provide for public participation in such management. See SOR at 4-5 (citing 43 U.S.C. §§ 1701(a)(5) and 1739(e) (1994)). The present case involves management, not rulemaking, and Island Mountain points to no rule that requires public participation in BLM's decision to authorize the tailings deposit cleanup. Thus, Island Mountain fails to show a violation of FLPMA.

11/ We note that 40 C.F.R. § 1501.4(b) requires that BLM, "to the extent practicable," involve the public. Further, 40 C.F.R. §§ 1506.6(b) and (d) require that BLM provide the public "notice" of the "availability of environmental documents" and "[s]olicit appropriate information" from the public.

resulted in a consensus broadly supporting removal and reclamation of the tailings deposit. (EA at 1; Haight Notes.) Also, once prepared, copies of the draft plan were sent to and comments obtained from EPA and Montana DSL. Comments were also solicited from placer mining claimants in the area. EPA also reviewed the EA. Further, the principal impact of the proposal was expected to be a beneficial impact on water quality downstream of the deposit. Thus, only a very small segment of the public would be directly affected by removal/reclamation activities, since King Creek enters the Reservation a short distance after leaving the deposit. FBCC, which represents the interests of residents living within the Reservation, participated in the November 1991 meeting and was also afforded an opportunity to comment on the draft plan.

Given all these circumstances, we decline to set aside the Area Manager's March 1993 ROD/FONSI, and remand the case to BLM to provide notice and an opportunity for public comment, since to do so will clearly be of little or no benefit to BLM's understanding of the environmental consequences of ZMI's proposed plan or the desirability of adopting it. Sierra Club, Inc., 92 IBLA 290, 299-300 n.5 (1986); cf. SUWA, 122 IBLA 6, 14 (1991) (failure to allow public comment on revised EA not fatal where comment invited on original EA and further input concerning revision solicited from interested party).

Next, FBCC contends that BLM erred in not consulting fully with it: "While the potential cleanup of King Creek has been discussed for some time, there has been very minimal discussion with the Council about the project. The Council believes that only one (1) meeting was conducted with the Council on the proposal." (SOR at 1.) The record reveals that BLM consulted with FBCC concerning ZMI's proposed plan on September 14, 1992. (EA at 18.) BLM had also met with interested parties, including FBCC, on November 13, 1991, to generally address concerns regarding the tailings deposit. See EA at 1; Haight Notes. BLM reports that the result of that meeting was a "consensus," supported by FBCC, that "ZMI would voluntarily undertake removal and reclamation of the tailings in the upper drainage of King Creek." (Answer at 7.) See also EA at 1; Haight Notes. In particular, ZMI "agreed * * * to provide a detailed reclamation plan for agency review early next year." (Haight Notes.) That FBCC attended the meeting, and supported, in principle, removal/reclamation, is not disputed by FBCC. Further, FBCC had the opportunity, throughout the environmental review process after it became aware of the submission of ZMI's proposed plan on September 14, 1992, to provide written comments on the plan and its effects to BLM. We are not persuaded that BLM committed any error by not consulting further with FBCC.

FBCC and Island Mountain contend that BLM should have coordinated its environmental review and decisionmaking as to ZMI's removal/reclamation plan with efforts then being made by EPA to determine whether to designate the entire King Creek drainage as a "[S]uperfund site," and thus subject to cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601-9675 (1994).

(FBCC SOR at 2.) 12/ FBCC, together with Island Mountain, essentially asserts that BLM should have deferred approval of ZMI's plan pending action by EPA: "It makes little sense that a partial, incomplete cleanup be authorized when a more thorough, comprehensive cleanup is being evaluated." (FBCC SOR at 2.)

EPA, on January 26, 1993, prepared a "Preliminary Assessment," preparatory to deciding whether to designate the King Creek drainage, extending from the headwaters of King Creek 3 miles downstream to Little Peoples Creek, as a Superfund site. The record discloses that a copy of that assessment was provided by EPA, and received by BLM on March 22, 1993, before the Area Manager issued her ROD/FONSI. Therein, EPA determined that tailings deposits in the King Creek drainage were not then causing any degradation of air or groundwater quality. See Preliminary Assessment at 10. EPA did find a limited adverse impact on surface water quality:

> There is evidence of elevated metal levels in surface water near the original mine tailings deposits. Sediment deposits partially or entirely composed of milled tailings have migrated through the surface water pathway and have elevated sediment metal concentrations for at least three miles from the King Creek headwaters area.

Id. at 11. EPA, however, made no recommendation regarding Superfund designation. Nor is there any evidence that the headwaters tailings deposit, let alone the entire drainage, will ever be designated as a Superfund site, or, even if it is, that the cleanup undertaken under CERCLA will differ in any material respect from that now approved by BLM. In these circumstances, we are not persuaded that BLM was required, or that it was even prudent, to delay removing the deposit and reclaiming the affected land based solely on speculation that a "more thorough, comprehensive cleanup" will be undertaken under CERCLA. 13/ Rather, it seems fairly clear that to defer adoption of the plan proposed by ZMI would simply invite the adverse

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12/ FBCC, together with Island Mountain, also asserts that BLM, at a minimum, should have consulted with EPA before deciding to approve the proposed removal/reclamation plan. EPA did review the plan and generally supported it. See EA at 18; Letter to Pegasus from Director, Montana Office, EPA, dated June 30, 1992; Memorandum to Director, Montana Office, EPA, from Ron Bertram, EPA Environmental Scientist, dated June 29, 1992. The record also establishes that Bertram, who had reviewed ZMI's Draft Plan on behalf of EPA, similarly reviewed BLM's EA before the Area Manager issued her ROD/FONSI. In a Mar. 19, 1993, conversation with Haight, Bertram stated that he "had no comments or suggested changes" on the EA. (Conversation Record, dated Mar. 19, 1993.)

13/ In his Mar. 19, 1993, conversation with Haight, Bertram stated that EPA had finished the "PA (preliminary assessment) on the area," but did not assert or suggest that BLM should delay its approval of ZMI's plan pending completion of EPA's Superfund analysis. (Conversation Record, dated Mar. 19, 1993.)

environmental impacts, occasioned by the continued presence of the deposit, to persist, with no evidence of any corresponding benefit. 14/

Overall, the record evidences that BLM, in deciding whether to approve ZMI's proposed plan for removing and reclaiming the King Creek Tailings Deposit, took a hard look at the environmental consequences of doing so, taking into account all relevant matters of environmental concern, and made a convincing case that, given appropriate mitigation measures, no significant impact will result therefrom. FBCC presents no objective proof to the contrary, but offers only its opinion, which is not sufficient to carry its burden of demonstrating error. Red Thunder, Inc., 117 IBLA at 175, 97 I.D. at 267. We, thus, conclude that BLM complied with the dictates of section 102(2)(C) of NEPA. Sierra Club, Inc., 92 IBLA at 302-03.

To the extent not expressly addressed herein, the other arguments made by FBCC and Island Mountain have been considered and rejected.

We conclude that the Area Manager, in her March 1993 ROD/FONSI, properly approved ZMI's proposed plan for removing and reclaiming the King Creek Tailings Deposit, and found that no significant environmental impact would result therefrom.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____
Gail M. Frazier
Administrative Judge

I concur:

_____
C. Randall Grant, Jr.
Administrative Judge

_____
14/ There is no evidence that, as Island Mountain says, the current cleanup of the original tailings deposit will "affect EPA's ultimate conclusion with respect to Superfund status for the King Creek drainage." (SOR at 8; see also First Reply at 3.) Nor is there any evidence that cleaning up the main deposit will in fact affect whatever liability there is with respect to the cleanup of the downstream deposits. See id.